

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

UNITED STATES OF AMERICA, and )  
THE OSAGE MINERALS COUNCIL, )

Plaintiffs, )

vs. )

Case No. 14-CV-704-GKF-JFJ

OSAGE WIND, LLC; )

ENEL KANSAS, LLC; and )

ENEL GREEN POWER NORTH )

AMERICA, INC., )

Defendants. )

**DEFENDANTS' RESPONSE TO PLAINTIFF THE UNITED  
STATES' MOTION FOR SUMMARY JUDGMENT [Dkt. # 300]**

# EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

and

OSAGE MINERALS COUNCIL,

Intervenor-Plaintiff,

vs. No. 14-CV-704-GFK-JFJ

OSAGE WIND, LLC; ENEL KANSAS,  
LLC; and ENEL GREEN POWER  
NORTH AMERICA,

Defendants.

VIDEOTAPED VIDEOCONFERENCE DEPOSITION OF BILL MOSKALUK  
TAKEN ON BEHALF OF THE PLAINTIFF  
ON JUNE 16, 2021 AT 10:00 A.M.

14 APPEARANCES

15 On behalf of the PLAINTIFF:  
Stuart Ashworth  
16 Cathryn D. McClanahan  
Nolan Fields  
17 UNITED STATES ATTORNEY'S OFFICE  
Northern District of Oklahoma  
18 110 West 7th Street, Suite 300  
Tulsa, Oklahoma 74119  
19 918.382.2700  
stuart.ashworth@sol.doi.gov

21 (Appearances continued on the following page)

22 ALSO PRESENT: Megan Beauregard, Michelle Hammock, &  
23 Christina Watson

24 VIDEOTAPED BY: Megan Smith

25 REPORTED BY: Abby Rhodes, CSR, RPR

1 A At that time, probably so, yes.

2 Q Okay. Do you -- do you know now, right now  
3 as we speak?

4 A I don't recall what the issues were but...

5 Q Okay. And again, it seems like this is the  
6 day before excavation work would have started, and you  
7 don't know what the issues -- issues that would have  
8 been discussed here?

9 A No, I really don't recall.

10 Q Okay. We're going to go back to your  
11 declaration and we're going to go to paragraph 15  
12 under A, little I, I'm going to actually let you read  
13 this to yourself and let me know when you're done.

14 A Okay.

15 Q You're making this, the declaration, the  
16 statement in this section because you wanted the Court  
17 to know about the excavation process in the case; is  
18 that correct?

19 A Yes.

20 Q Okay. In fact, you believe that by telling  
21 the Court about the excavation process, you were  
22 somehow trying to be helpful to defeat the U.S.'s  
23 request for injunction in the case; is that right?

24 MR. RAY: Object to form.

25 THE WITNESS: Now, say that again.

1 Q (By Mr. Ashworth) Sure.

2 By -- by making your statement here, by  
3 informing the Court about the excavation process,  
4 you're trying to be helpful to -- you know, in  
5 opposition to the U.S.'s request for injunction; is  
6 that right?

7 MR. RAY: Same objection.

8 THE WITNESS: I'm not sure. At that time, I  
9 think I was just basically explaining the excavation  
10 process on foundations, nothing to do with anything  
11 else.

12 Q (By Mr. Ashworth) Sure.

13 Do you believe that everything within this  
14 section is accurate, an accurate -- accurately  
15 reflects the excavation for foundation in the case,  
16 for the foundation in the case?

17 A To the best of my knowledge, yes.

18 Q Okay. Nowhere in this section did you  
19 inform about the significant amount of blasting that  
20 was taking place at the time; is that correct?

21 A This was prior to the blasting.

22 Q I'm sorry, when did the blasting take place?

23 A I'm not sure of the specific date, but  
24 everybody that was involved with the blasting of these  
25 excavations were relying on a document that was put

1 don't know.

2 As I stated before, you can use this  
3 material if we didn't have the restrictions in place.  
4 This is just a -- like a boilerplate type requirement  
5 on the project.

6 Q Okay. So when you say this is a boilerplate  
7 requirement for the project, are you indicating that  
8 it's kind of a loose requirement that doesn't have to  
9 be filled -- followed?

10 MR. RAY: Object to form.

11 THE WITNESS: I don't think it was intended  
12 to be followed, actually, because of the restrictions  
13 that we had. Other than that, I -- I don't really  
14 know.

15 Q (By Mr. Ashworth) Okay. But nowhere in your  
16 declaration did you indicate that there was a scope of  
17 work that would have allowed the crushed rock to be  
18 used for something other than backfill?

19 MR. RAY: Object to form.

20 THE WITNESS: Yes.

21 Q (By Mr. Ashworth) Okay. We're going to go  
22 to subparagraph, it's little numeral -- numeral  
23 number -- or I'm sorry, numeral five which is on page  
24 5. Oh, I'm sorry, it's declaration. Page 5, little  
25 numeral five. One page down. In this section, I'm

1 correct?

2 A The backfill material was for the structural  
3 support. The other area was for drainage that we  
4 built up draining it away from the turbine itself, and  
5 a portion of that in that little access road and apron  
6 around the terminal -- around the turbine, but it  
7 didn't leave that particular site, to my knowledge.

8 Q Did you tell the Court that the material is  
9 being used for structural support in your declaration?

10 MR. RAY: Object to form.

11 THE WITNESS: I don't think so, no.

12 Q (By Mr. Ashworth) Do you think it would have  
13 been important for the Court to know that Enel Green  
14 and Osage Wind was using the backfill material for  
15 structural support?

16 MR. RAY: Object to form.

17 THE WITNESS: I -- I don't know the answer  
18 to that.

19 Q (By Mr. Ashworth) Okay. Let me re-ask it  
20 this way: Do you know if it would have been important  
21 for the Court to know that the materials that were  
22 excavated on site was being used for structural  
23 support for the wind tower?

24 MR. RAY: Object to form.

25 THE WITNESS: I -- I don't -- I don't know

1 correct?

2 A The backfill material was for the structural  
3 support. The other area was for drainage that we  
4 built up draining it away from the turbine itself, and  
5 a portion of that in that little access road and apron  
6 around the terminal -- around the turbine, but it  
7 didn't leave that particular site, to my knowledge.

8 Q Did you tell the Court that the material is  
9 being used for structural support in your declaration?

10 MR. RAY: Object to form.

11 THE WITNESS: I don't think so, no.

12 Q (By Mr. Ashworth) Do you think it would have  
13 been important for the Court to know that Enel Green  
14 and Osage Wind was using the backfill material for  
15 structural support?

16 MR. RAY: Object to form.

17 THE WITNESS: I -- I don't know the answer  
18 to that.

19 Q (By Mr. Ashworth) Okay. Let me re-ask it  
20 this way: Do you know if it would have been important  
21 for the Court to know that the materials that were  
22 excavated on site was being used for structural  
23 support for the wind tower?

24 MR. RAY: Object to form.

25 THE WITNESS: I -- I don't -- I don't know

1 that answer.

2 Q (By Mr. Ashworth) Okay. Is the reason why  
3 you failed to tell the Court in your declaration that  
4 the purpose for the excavated material to be used was  
5 for structural support? Is that reason -- scratch  
6 that.

7 Is the reason why you said that -- did not  
8 say that was to help Enel Green defeat the request for  
9 injunction?

10 A I don't --

11 MR. RAY: Object to form.

12 THE WITNESS: I don't think that was the  
13 intent, no.

14 Q (By Mr. Ashworth) Okay. Under the --  
15 paragraph underneath there, right under the page, it  
16 says "No excavated rock or sand is sold or used for  
17 commercial purposes."

18 Is that -- was that a correct statement?

19 A Yes.

20 Q Okay. You separate sold and commercial  
21 purposes.

22 When you're saying not used for commercial  
23 purposes, are you meaning that the rock and sand were  
24 not being used to advance any economic purpose of Enel  
25 Green?



1 Q No worries.

2 I said how would you define a borrow pit?

3 A Material where I could take material out of  
4 and use for around the project.

5 Q And is it typical to have a borrow pit on  
6 site during the construction of a wind farm?

7 A It's always a nicety. It --

8 Q Do you -- oh, go ahead.

9 A It will save you a lot of costs in trucking  
10 if it -- if it was right there on site.

11 Q Is that something that you would normally  
12 expect the -- the subcontractor, for instance in this  
13 case IEA, to create as a part of their work in -- in  
14 constructing the wind farm?

15 A No. I think it has to be designated ahead  
16 of time, the borrow areas on the project site.

17 Q Do you know, were there borrow pits used or  
18 created for -- for this construction, for the  
19 construction of the Osage Wind farm?

20 A No.

21 Q Do you --

22 A I --

23 Q Go ahead.

24 A -- I don't think we had one.

25 Q Was that a decision -- was the decision to

1    remove ANY soil from the project site or use site  
2    materials in lieu of materials we would typically buy  
3    off site in developing a wind project.  Osage Nation  
4    has mineral rights for the project lands and removal  
5    of soil especially for commercial gain could  
6    constitute mining."

7                   Is that -- so I'm just reading there from  
8    Aaron's e-mail.  Is that -- does Aaron's statement  
9    here, is that in accordance or does that agree with  
10   your understanding of what the restrictions were at  
11   the time of construction of the Osage Wind farm?

12                   MR. RAY:  Object to form.

13                   THE WITNESS:  Yes.

14           Q        (By Ms. Nagle) And I know you're not copied  
15   on this e-mail, but did -- did anyone ever communicate  
16   that to you?

17           A        Communicated it, yes.  Yes, they have.

18           Q        Do you remember -- oh, sorry.  Go ahead.

19           A        Yeah, it -- it was Bill Price who -- who  
20   told me that.  He wanted to make sure that I knew that  
21   I was not to remove any materials from site in any  
22   manner or form.  I knew that.

23           Q        And did Bill Price tell you that we -- that  
24   you were also not to use site materials in lieu of  
25   materials that could be bought or purchased off site?

1 A No, he did not.

2 Q He did not tell you that. Okay.

3 Now, further on down in this e-mail from  
4 Aaron Weigel, he writes "Please make sure this message  
5 is widely communicated to any subcontractors working  
6 on the project."

7 Do you recall anyone at EGPNA asking you to  
8 communicate, make sure that the folks at IEA  
9 understood the message that Aaron Weigel is sharing  
10 here in this e-mail?

11 A No.

12 Q Okay. Do you have any memory of anyone at  
13 EGPNA, other than Bill Price, communicating to you  
14 that it was important to not use the site materials in  
15 lieu of materials that could be purchased off site?

16 A No.

17 Q Okay. Now, I think earlier you did mention  
18 that one of the restrictions you understood at the  
19 time was that you were not allowed to take site  
20 materials and -- and move them across the wind farm  
21 and use them elsewhere.

22 Can you explain to me -- is that -- is that  
23 a correct understanding of what you understood to be  
24 the limitation at the time?

25 A Yes, it -- all the material that we, say,

1 excavated from the turbine site or that particular  
2 turbine site had to remain right there. I couldn't  
3 use that material any place on the job site other than  
4 that hole.

5 Q So your understanding was you -- you -- you  
6 could take the minerals out of the ground, but you had  
7 to put them right back where you got them; is that  
8 correct?

9 A Correct.

10 Q Was your understanding that it was  
11 permissible for EGPNA to -- to do that and crush the  
12 materials before putting them back in the ground?

13 A I caught a little bit of that but I didn't  
14 really understand --

15 Q Sure.

16 A -- the last part.

17 Q So I guess let me rephrase and ask a better  
18 question.

19 Did anyone ever express to you, anyone from  
20 EGPNA ever express to you any limitations on rock  
21 crushing?

22 A No.

23 Q Okay. Let's see here. Okay. So I'm now  
24 going to show you a different document so if you'll  
25 give me just a second to pull that up. I'm going to

1 materials in lieu of materials we would typically buy  
2 off site in developing a wind project. Osage Nation  
3 has mineral rights for the project lands and removal  
4 of soil especially for commercial gain could  
5 constitute mining."

6 Does it -- does this sound familiar to you,  
7 this -- this statement and this understanding of what  
8 was permissible and what was not?

9 MR. RAY: Object to form.

10 THE WITNESS: Partially, yes, but, like I  
11 said, I'm not familiar with this one, with all... any  
12 soils from the site and I never heard of using the  
13 materials in lieu of materials from -- we had  
14 typically bought off site. I've -- I've never heard  
15 that before.

16 Q (By Ms. Nagle) Okay. And did you -- did  
17 Joan Heredia ever communicate directly with you about  
18 any limitations in constructing the Osage Wind farm?

19 A She visited the job site I believe once and  
20 we had a conversation basically in regards to this.  
21 She asked me if I was removing any of the material off  
22 site and I said no. She basically said, well, good.

23 Q Mmm-hmm.

24 Do you -- do you recall when that visit was,  
25 what month it would have been?

1 Q And was he with IEA?

2 A Yes, he was.

3 Q Okay. And it looks like below, we've got  
4 this -- at the very bottom we've got this e-mail here  
5 from Brian Jensen.

6 Do you recall who Brian Jensen was?

7 A Yes, he worked for Tradewinds. In what  
8 capacity, I'm -- I'm not really sure.

9 Q Okay. Did you ever interact with him while  
10 working on the Osage Wind farm?

11 A I might have talked to him a couple of  
12 times. Nothing pertinent but...

13 Q Sure. He writes here in his July 9, 2014,  
14 e-mail, that "And as we have discussed in the past, we  
15 will not be able to transport fill from one part of  
16 the project to another due to Osage Nation mining  
17 laws."

18 A Right.

19 Q Does that conform with your understanding of  
20 what some of the limitations were at the time of  
21 construction?

22 A Yes.

23 Q Okay. And let's see here. Let me keep  
24 going. What was your understanding, though -- you  
25 told me that Steve Champagne had -- had told you that